



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**MISCELLANEOUS CIVIL CASE 101 OF 2007**

**PATRICK J.O. OTIENO & GEOFFREY O. YOGO**

**T/A OTIENO YOGO & COMPANY ADVOCATES ..... APPLICANT**

**VERSUS**

**CO-OPERATIVE BANK (K) LTD ..... RESPONDENT**

**RULING**

On the 2<sup>nd</sup> April 2008, a Chamber Summons dated 31<sup>st</sup> March 2008, was presented to the court by the firm of Ochieng Onyango Kibet & Ohaga advocate for and on behalf of Co-operative Bank of Kenya Limited herein referred to as the first garnishee applicant.

The chamber summons was brought Under S.3, 3A and 63(e) of the civil procedure Act and Order XXII rules 7, 8 and 10 of the Civil Procedure Rules and was for the following orders:

- (i) That the application be certified urgent and service thereof be dispensed with in the first instance.**
- (ii) That there be a stay of execution of the Garnishee Order Absolute issued on 28<sup>th</sup> February 2008, herein and the Ruling delivered on 6<sup>th</sup> March 2008, pending the hearing and determination of this application *inter-parties*,**
- (iii) That there be a stay of execution of the Garnishee Order Absolute issued on 28<sup>th</sup> February 2008, herein and Ruling delivered on 6<sup>th</sup> March 2008, pending the lifting of the Moratorium issued by the statutory manager of the defendant herein;**
- (iv) That in the alternative and without prejudice to the foregoing, the Garnishee Order Absolute issued on 28<sup>th</sup> February 2008, and Ruling delivered on 6<sup>th</sup> March 2008, be set aside.**
- (v) That the applicant be at liberty to apply for further Orders and/or Directions as this honourable court may deem fit.**
- (vi) That the costs of the application be in the cause.**

The application as contained in the chamber summons was presented under certificate of urgency and was accordingly certified by the court as urgent.

To that effect hearing *inter-partes* of the application was fixed for 14<sup>th</sup> April 2008, and interim orders were granted in terms of prayers (2) and (3) of the application. The said prayers (2) and (3) are that there be a stay of execution of the Garnishee Orders absolute issued on 28<sup>th</sup> February, 2008, and the ruling delivered on 6<sup>th</sup> March 2008, pending *inter-partes* hearing of this application and that there be a stay of execution of the Garnishee Orders absolute issued on 20<sup>th</sup> February 2008, and ruling delivered on 6<sup>th</sup> March 2008, pending the lifting of the moratorium um issued by the Statutory Manager of the defendant. The orders were duly extracted for service to all the interested parties.

On the day of the presentation of the chamber summons i.e. 2<sup>nd</sup> April 2008, the firm of Ochieng Onyango, Kibet & Ohaga advocates at the same time filed a notice of change of advocate dated 31<sup>st</sup> March 2008, to be served upon Odhiambo Owiti & Co. Advocate and Otieno Yogo & Co. Advocates.

At the time the disputed garnishee order was made, Odhiambo Owiti & Co. Advocates were the advocates on record for the first Garnishee Co-operative Bank of Kenya Limited. The notice of change of advocates filed on 2<sup>nd</sup> April 2008, by Ochieng, Onyango, Kibet & Ohaga Advocates was in effect a change of guard and/or ouster of Odhiambo Owiti and Company Advocates from representing the first garnishee from that date thereof.

Messrs. Ochieng, Onyango, Kibet & Ohaga Advocates therefore took over the conduct of this case on behalf of the first garnishee/applicant.

At the hearing *inter-partes* of the present application Mr. Otieno appeared for the respondent/plaintiff/judgment-creditor, Mr. Bwire for the first garnishee applicant and M/s. Nungo for the statutory manager of the defendant/Judgment-debtor.

Mr. Otieno commenced by raising a preliminary objection to the application and urged the court to have the same struck out with costs.

The objection was however opposed by Mr. Bwire and M/s. Nungo. On the outset, the objection was based on three broad grounds Viz:-

- (a) The notice of change of advocate by Messrs. Ochieng, Onyango, Kibet & Ohaga was filed on the 2<sup>nd</sup> April 2008, without an application and an order to that effect contrary to the requirements of Order 3 rule 9A CPR.**
- (b) The said notice of change of advocate was not served as required by Order 3 rule 6 CPR.**
- (c) The application inasmuch as it is made under S. 3, 3A and 63 of the Civil Procedure Act ought to have been made by way of notice of motion and not chamber summons.**

Regarding the first ground, Mr. Otieno argued that the firm of Ochieng, Onyango, Kibet & Ohaga Advocate, ought to have moved the court by way of Order 3 rule 9A C.P.R. prior to making the application because prior to the filing of the application there was on record the firm of Odhiambo Owiti & Company Advocates representing the first garnishee/applicant and that it was the same firm of Odhiambo Owiti & Company Advocates which was in conduct of the garnishee proceedings on behalf of the applicant which proceedings culminated in the issuance of the disputed Garnishee Order absolute. Mr. Otieno contended therefore that the Garnishee order absolute was in effect a judgment against the applicant and as such the firm of Ochieng, Onyango, Kibet & Ohaga ought to have approached the court by way of order 3 rule 9 A C.P.R. for leave to file a notice of change of advocate. To fortify the argument, Mr. Ochieng referred to High Court decisions in **Victoria Commercial Bank Limited VS. Nicholas Randa Owano Ombija** (unreported). HCCC No. 353/04 at Kisumu, **Julius Oduor VS. Shem Okeyo** (unreported). HCCC No 107/92 at Kisumu and **Mbogo VS. Asikoyo & 3 Others** (2004) 1 KLR

In response, Mr. Bwire argued that Order 3 rule 9 A C.P.R. contemplates a situation where parties have been in a suit prior to and after judgment. Therefore, the applicant was not such party as it came into the suit at the point of execution and after judgment was received. It fell out of the purview of Order 3 rule 9 A and did not have to seek leave. M/s. Nungo sided and agreed with Mr. Bwire who contended that the cases cited hereinabove presented a different picture and irrelevant in the circumstances.

Order 3 rule 9 A C.P.R. provides as follows:

**"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record."**

The key words in the provision are *"When there is a change of advocate or when a party decides to act in person having previously engaged an advocate ..... after judgment has been passed."*

The question arising is whether the applicant/1<sup>st</sup> Garnishee was a party to the suit and if so, whether judgment was passed against itself. This present suit is essentially a miscellaneous application No. 101/07, for the purposes of taxing bills of cost in respect of several lower court cases filed by various individuals against the defendant/judgment-debtor Invesco Assurance Company Limited.

In those suits, the applicant herein was never a party. However, it became a party in this miscellaneous application by virtue of the application made by the plaintiff/respondent on 21<sup>st</sup> February 2008. The application was an attempt by the plaintiff/respondent to execute decrees issued by the lower courts and probably by the High Court against the defendant Invesco Assurance Company Limited.

The application was made *ex parte* and sought orders for the attachment of monies held by the applicant/1<sup>st</sup> Garnishee and another for and on behalf of the defendant/judgment-debtor and for the 1<sup>st</sup> Garnishee and another 2<sup>nd</sup> Garnishee to attend court to show cause why it should not pay the decree holder specified amounts of money. The Deputy Registrar after hearing the application issued a garnishee order *nisi* against the two garnishees and directed that any objections by the garnishee be heard on 28.2.2008. On that 28<sup>th</sup> February 2008, the applicant /first garnishee appeared in court represented by the firm of Odhiambo Owiti & Company Advocates. The 2<sup>nd</sup> Garnishee did not appear and neither did the judgment-debtor. The plaintiff appeared and was represented by the firm of Otieno, Yogo & Company Advocates.

The Deputy Registrar heard the arguments of those present and ruled that the garnishee Order *nisi* made on 21<sup>st</sup> February 2008, be made absolute and that a sum of KShs.1,367,634/65 be paid to the plaintiff from the account of the judgment-debtor held by the applicant/1<sup>st</sup> garnishee.

Thereafter, on the 6<sup>th</sup> March 2008, the applicant/1<sup>st</sup> garnishee through the firm of Odhiambo Owiti & Co. Advocates returned to court seeking directions on the basis that the defendant/judgment-debtor had been placed under receivership and a moratorium on all its payments had been declared making it impossible for the applicant to comply with the payment order earlier issued against itself. The Deputy Registrar gave direction in the following terms:-

**"The direction of the court is therefore that garnishee order having been issued prior to the moratorium being declared ..... the 1<sup>st</sup> Garnishee is under duty to comply with the same."**

After the directions, the 1<sup>st</sup> Garnishee through Mr. Ken Owiti and the plaintiff through Mr. Otieno entered into the following contest:-

**"stay of execution granted for 7 days to facilitate settlement."**

However, in a curious turn of events, the firm of Ochieng, Onyango Kibet & Ohaga Advocates filed a notice of change of advocates on the 2<sup>nd</sup> April 2008, together with the present application for and on behalf of the 1<sup>st</sup> Garnishee/applicant. Both the notice and the application are dated 31<sup>st</sup> March 2008. The application was in the first instance presented ex-parte and the applicant/1<sup>st</sup> Garnishee managed to obtain favourable interim orders through the firm of Ochieng, Onyango, Kibet & Ohaga Advocates.

It is apparent from hereinabove that the applicant being a party to this cause obtained interim orders to counter or shield itself against the orders made by the court on 28<sup>th</sup> February 2008, and 6<sup>th</sup> March 2008. In effect the order made on the 28<sup>th</sup> February 2008 and confirmed on 6<sup>th</sup> March 2008 was capable of execution against the applicant/1<sup>st</sup> Garnishee and therefore amounted to a judgment against the applicant/1<sup>st</sup> Garnishee. This explains the consent order made on 6<sup>th</sup> March 2008, before the Deputy Registrar.

The Civil Procedure Act does not contain the definition of a judgment. However, it defines a judgment-debtor as any person against whom a decree has been passed or an order capable of execution has been made.

The Garnishee order absolute made against the applicant/1<sup>st</sup> Garnishee was an order capable of execution. It constituted a judgment against the applicant as argued by the plaintiff/respondent.

There having been a judgment against the applicant, it was incumbent upon the firm of Ochieng, Onyango, Kibet and Ohaga Advocates to apply and obtain leave of the court as required by order 3 Rule 9 A(111) of the C.P.R. prior to their purported representation of the applicant in this matter. Whether or not the notice of change of advocate dated 31<sup>st</sup> March 2008, was served it was of no effect inasmuch as it contravened the requirements of Order 3 rules 9 A[iii] C.P.R. Consequently, the ex-parte orders made on the 2<sup>nd</sup> April, 2008, were obtained irregularly and improperly upon an application made by a firm of advocates with no *locus standi* in this matter. The application was thus incompetent, invalid and an abuse of the court process.

In the case of **Julius Oduor VS. Shem Okeyo** KSM HCCC No. 107/92 (Unreported) the court held that an application which was unprocedurally filed does not fall to be heard and was an abuse of the court process.

In the case of **Mbogo VS. Asikoyo & Others** [2004] 1 KLR 697, the requirements of Order 3 rule 9 A C.P.R. were emphasized by the court which held that a party must file a separate application seeking for leave to come on record before seeking other remedies failing which any pleadings filed will be incompetent for being improperly on record.

In the Case of **Anne & Agnes 1997 Ltd. VS. Diamond Trust Bank Ltd. KSM.** HCCC No.388/99 (unreported) the court observed that leave sought under Order 3 rule 9A C.P.R. should not be mixed or combined with any other application by the same advocates because any matter undertaken by them would be of no effect if they have not properly come on record. The position in this case is more or less similar to that in the aforementioned cases which have to be applied herein with approval.

The first ground of the preliminary objection is thus upheld and in the circumstances a pressing need to address the remaining two grounds does not arise.

However, if this court were to comment on the remaining grounds it would hold ground two valid and sustainable on the basis that if the notice of change of advocate was validly on record then it ought to have been served upon the respondent in accordance with Order 3 rule 6 C.P.R. which requires that a notice of change of advocate be filed in court and served in accordance with Rule 7. In this matter, the disputed notice of change was served along with the application which was brought under certificate of

urgency with dispensation of service in the first instance. The dispensation of service in the circumstances was in the court opinion, in relation to the application and not the notice of change. The notice of change ought to have been filed and served prior to the application. Otherwise the incoming advocate would have no *locus standi* in terms of Order 3 rule 6 C.P.R. It was tactfully conceded herein by the applicant that the disputed notice of change was not even served upon the respondent as required by Rule 6 of Order 3 C.P.R. Not even a return of service was filed to indicate service.

As regards ground three of the objection it was contended by the respondent that the application ought to have been made by notice of motion and not chamber summons inasmuch as S.3, 3A and 63 of the C.P.A. were invoked.

Order 50 rule 1 C.P.R. provides that:-

**"All application to the court, save where otherwise expressly provided for under these rules shall be by motion and shall be heard in open court."**

In the case of [**Francis W. Wanganga & Another VS. Rudolf Hunziker & 2 Others** (unreported) MSA. Misc. Appl. No. 306/01] an application was brought under S.3A and S.63 (c) (e) of the Civil Procedure Act and the court had the following to say:-

**"The power of court provided under the section is intended to supplement the other provisions of the Civil Procedure Act and the rules made thereunder and not to evade or ignore them to invent a new procedure according to individual sentiments. Where express provision exists to take care of a situation therefore this court will find no room to apply Section 3A as that will effectively be creating on individual procedure. It is (-----) also that if irregular use of section 3 A is allowed, parties to suits will neglect to avail themselves of the relevant remedies provided elsewhere in the Act and under the Civil Procedure Rules with the result that practice will end up in total confusion. This should not be allowed to happen by the courts of law known for and expected to maintain order"**

As for Garnishee Orders, the procedure provided is contained in Order 22 C.P.R. Having invoked Rules 7, 8 & 10 of Order 22 C.P.R. it was undesirable and improper for the applicant to also invoke S.3, 3A and 63 of the C.P.A.

An application under the said provisions is made by notice of motion in terms of Order 50 rule 1 C.P.R. and not by chamber summons.

Although the present application is by chamber summons and not by notice of motion it ought not be dismissed since its substance is on the basis of Order 22 C.P.R. which provides for chamber summons (Rule 10).

The mistake made may be corrected by a withdrawal of the application and filing a fresh one based solely on the prescribed procedure. In the case of Francis Wanganga and Another (Supra) the application was made under S. 3A and S.63 C.P.A. and not in addition to any other provision.

In the case of [**Phaze Industries Ltd. Vs. Shaman Holdings & Another** (2006) KLR] the application was under S. 3A C.P.A. only. It would be in the interest of justice that a court should not shut out a party where other enabling provision have also been invoked.

The third ground of the application was unsustainable.

All in all the preliminary objection by the respondent is upheld with the result that the present application by the first Garnishee/applicant is hereby struck out with costs.

Read, Signed this 24<sup>th</sup> day of April, 2008.

**J. R. Karanja**

**JUDGE**

JRK/mo.